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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 MARK I. SOKOLOW, et al.,,

4 Plaintiffs,

5 v.

04-CV-397 (GBD)

6 PALESTINE LIBERATION  
7 ORGANIZATION, et al.,

8 Defendants.

Oral Argument

9 -----x  
10 New York, N.Y.  
11 March 4, 2014  
12 10:58 a.m.

13 Before:

14 HON. GEORGE B. DANIELS,

15 District Judge

16 APPEARANCES

17 ARNOLD & PORTER, LLP  
18 Attorneys for Plaintiffs  
19 BY: KENT A. YALOWITZ, ESQ.  
20 PHILIP W. HORTON, ESQ.  
21 CARMELA T. ROMEO, ESQ.  
22 TAL R. MACHNES, ESQ.  
23 KEN L. HASHIMOTO, ESQ.

24 ROBERT J. TOLCHIN, ESQ.  
25 Attorney for Plaintiffs

26 MILLER & CHEVALIER, CHTD.  
27 Attorneys for Defendants  
28 BY: MARK JOHN ROCHE, ESQ.  
29 LAURA G. FERGUSON, ESQ.  
30 BRIAN A. HILL, ESQ.

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1 (In open court; case called)

2 THE CLERK: Will the parties please rise and state  
3 their appearances, please.

4 MR. YALOWITZ: Good morning, your Honor. Kent  
5 Yalowitz, Arnold & Porter, on behalf of all plaintiffs. With  
6 me are my colleagues from Arnold & Porter Philip Horton, Tal  
7 Machnes, and Carmela Romeo, and Ken Hashimoto, who's afraid  
8 he's infectious and so he's staying in the audience. And also  
9 with us today, your Honor, is Robert Tolchin, who has been  
10 representing the plaintiffs longer than ourselves.

11 THE COURT: Good morning.

12 MR. YALOWITZ: Thank you.

13 MS. FERGUSON: Good morning, your Honor. Laura  
14 Ferguson on behalf of the Palestinian Authority and PLO. I'm  
15 here on with my colleagues from Miller & Chevalier, Mark Rochon  
16 and Brian Hill.

17 THE COURT: Good morning.

18 MR. ROCHON: Good morning, your Honor.

19 MR. HILL: Good morning, your Honor.

20 THE COURT: There are a number of issues that I wanted  
21 to address. I've gone through all of the papers, and I have  
22 sort of a method as to how I want to address these. I know  
23 you've been before Magistrate Judge Ellis and there are still  
24 some outstanding objections, and I guess I basically wanted to  
25 deal with these issues and sort of in reverse order and mostly

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1 talk about scheduling.

2 First of all, I know the parties are requesting a  
3 trial date. I need a date for a pretrial order, we need to  
4 deal with the issue of summary judgment motions and the motion  
5 for reconsideration and application for a stay, and motions *in*  
6 *limine* as the schedules are set or to be adjusted, and I put in  
7 that category all of what I consider to be trial issues, or  
8 issues of admissibility at trial. I know there's still a  
9 number of objections to the magistrate judge's decision and  
10 also relating to that, a request for further discovery, and the  
11 BBC issue has been percolating for a while and I want to  
12 address that. But I think the easiest way to start is, I want  
13 to talk about trial, and then we can work backwards.

14 So the first question that I have for plaintiffs is,  
15 for me to pick a tentative or firm trial date, what do you  
16 anticipate would be the length of the plaintiffs' case and  
17 approximately how many witnesses?

18 MR. YALOWITZ: So, your Honor, we believe the  
19 plaintiffs' case will be about seven weeks. We have  
20 directionally 35 witnesses. Could be more or less. A number  
21 of the witnesses we've listed are really foundational  
22 witnesses, which I'm hoping we can resolve foundational issues  
23 before we begin presenting the evidence to the jury.

24 THE COURT: What number are foundational witnesses of  
25 the 35?

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1 MR. YALOWITZ: Zero. So foundational witnesses would  
2 be extra.

3 THE COURT: You believe it's going to take seven weeks  
4 to present 35 witnesses?

5 MR. YALOWITZ: I'm sorry. I think it's more like 50  
6 witnesses. We have approximately 40 plaintiffs. We'll have  
7 approximately 10 experts. I misspoke, your Honor. So I think  
8 between the experts and the plaintiffs, we're going to need  
9 about seven weeks.

10 THE COURT: And what's the defense's position with  
11 regard to your case and approximately how many witnesses and  
12 how long would they take after the plaintiffs rest?

13 MR. HILL: Your Honor, Brian Hill. It will depend on  
14 what the trial looks like. As you know, there are seven  
15 different incidents. We don't think there's any chance all  
16 seven of them are going to go to trial, and if, after summary  
17 judgment, more than one of them is left, we're going to ask for  
18 severance at that point in time. So it's hard to estimate --

19 THE COURT: Let's assume at this point that all cases  
20 are going to trial on that date.

21 MR. HILL: Well, we have 17 expert witnesses, and  
22 depending on what evidence comes in, we may be calling fact  
23 rebuttal witnesses as well, so I would say we're looking at  
24 maybe three to four weeks of trial for the defense case.

25 THE COURT: So you're talking 10 to 12 weeks of trial?

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1 MR. YALOWITZ: I believe that's correct, your Honor.

2 THE COURT: If that is the case, I would not be able  
3 to give you -- I think one of the parties requested an October  
4 date. I wouldn't be able to do that. Couldn't clear my  
5 calendar for three months this October, and it would be even  
6 awkward for jurors, given all of the holidays in between. What  
7 I think would be appropriate is for me to clear my calendar as  
8 we begin to approach the end of the year for January, February,  
9 and March and prepare to try the case at that time.

10 MR. YALOWITZ: That would be agreeable to plaintiffs,  
11 your Honor.

12 THE COURT: Defense?

13 MR. HILL: We're conceivably available at that time,  
14 your Honor.

15 THE COURT: All right. So what I'm going to say is,  
16 let's start with a January 12 trial date. So if I have to  
17 clear my calendar for January through April, as we get closer  
18 and see how it unfolds, we can determine exactly what issues  
19 would be tried. So that's where we're going to start. I'm  
20 going to set a January 12 trial date.

21 I will need a joint pretrial order. I would like to  
22 have that --

23 MR. YALOWITZ: So, your Honor, I apologize for  
24 interrupting, but the parties submitted a joint pretrial order  
25 for the court's consideration on January 22. We've not filed

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1 that on the docket because there was a dispute.

2 THE COURT: That's true. I forgot about that.

3 MR. YALOWITZ: That's all right. There's a lot of  
4 moving pieces.

5 THE COURT: Okay. Well, we'll start with that, but I  
6 think obviously we may have to revisit it, depending on, you  
7 know, any other developments with regard to the motions and/or  
8 with regard to the witnesses. So I don't need to set another  
9 date for that. What I will do, though, is I will set a final  
10 pretrial date so we make sure we're all ready to go and address  
11 any issues that have to be addressed. I think it probably  
12 makes sense to do it, I'm going to say November 20<sup>th</sup>, which  
13 would be the Thursday before the week of Thanksgiving. I think  
14 that makes sense. That gives you enough time to finalize your  
15 preparations for trial even given the holidays in between. I'm  
16 picking January 12 as the trial date so the week before that  
17 can be a full week of work for everybody to fit in rather than  
18 setting it right after the new year and the holidays, give you  
19 another week there. And given the other holidays, I think it  
20 makes sense for us to have a final conference before  
21 Thanksgiving. So we'll say final pretrial conference on  
22 November 20<sup>th</sup> at 10:30.

23 All right. So then let's address the motions. The  
24 summary judgment motion, I believe Magistrate Judge Ellis  
25 already set a schedule for the motion. You've already begun.

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1 And the defense wants to make a motion for reconsideration.  
2 And then there are other motions which really address trial  
3 issues, motions *in limine*. I think there are some challenges  
4 to experts and that sort of thing.

5 Let's first talk about the motion for reconsideration.  
6 I have a lot of papers in front of me. I want to make sure  
7 that the schedule that I have for that -- well, let me look.

8 MS. FERGUSON: Your Honor, under the current schedule,  
9 plaintiffs' opposition would be due on March 21<sup>st</sup> and the  
10 reply brief would be due on May 2<sup>nd</sup>.

11 THE COURT: Now what have you filed at this point?

12 MS. FERGUSON: We have filed a motion for  
13 reconsideration based on the Supreme Court's case in *Daimler*.

14 THE COURT: Right.

15 MS. FERGUSON: And then we filed the letter motion  
16 last week seeking a stay based on another Supreme Court case  
17 that came down at the end of February, *Walden v. Fiore*.

18 THE COURT: The schedule that Judge Ellis set for  
19 motions, summary judgment motions *in limine*, was supposed to be  
20 March 21<sup>st</sup>?

21 MR. YALOWITZ: Correct, your Honor, also March 21.

22 THE COURT: All right. The motion for reconsideration  
23 is fully submitted at this point?

24 MS. FERGUSON: No, your Honor.

25 THE COURT: Excuse me. That's not what I meant to

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1 say. Plaintiff, you filed the motion in the form that you want  
2 it considered.

3 MS. FERGUSON: It's defendant's motion, your Honor.  
4 Yes, yes.

5 THE COURT: Right.

6 MS. FERGUSON: And that's correct.

7 THE COURT: Because you said *Daimler* and then you said  
8 it's all incorporated in the motion you already filed.

9 MS. FERGUSON: To be clear, the motion does not  
10 address *Walden v. Fiore*, the Supreme Court case on specific  
11 jurisdiction, because that came out after we filed our motion  
12 for reconsideration.

13 THE COURT: Okay.

14 MS. FERGUSON: And our position was that the court  
15 doesn't need to reach specific jurisdiction because the court's  
16 original ruling that it could exercise jurisdiction was based  
17 on general jurisdiction. It's just that in arguing whether we  
18 were entitled to a stay, the plaintiffs had raised the issue of  
19 potential *res* for specific jurisdiction and our point is that  
20 the new Supreme Court has foreclosed that avenue.

21 THE COURT: Is it appropriate for you and convenient  
22 for you to address that issue if it is to be addressed in your  
23 reply?

24 MS. FERGUSON: Yes, your Honor.

25 THE COURT: So what is the schedule? So you filed

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1 your motion, and the response is due on the 21<sup>st</sup>?

2 MR. YALOWITZ: Correct, your Honor.

3 THE COURT: Are you prepared to file a response on the  
4 21<sup>st</sup>?

5 MR. YALOWITZ: We are.

6 THE COURT: And then the reply would be due the  
7 23<sup>rd</sup>, or some other --

8 MS. FERGUSON: Under the current schedule the reply  
9 would be due May 2<sup>nd</sup>.

10 THE COURT: May 2<sup>nd</sup>? I'm sorry. Yes, May 2<sup>nd</sup>. I  
11 have that in front of me.

12 MS. FERGUSON: So we could accelerate that schedule,  
13 your Honor, if that's helpful.

14 THE COURT: I think that that makes sense. If  
15 March 21<sup>st</sup> is the response, how soon can you file a reply?

16 MS. FERGUSON: Ten days, your Honor?

17 THE COURT: April 1<sup>st</sup>?

18 MS. FERGUSON: That's fine, your Honor, yes.

19 MR. YALOWITZ: And just to be clear, your Honor, our  
20 March 21 paper will also cross-move for summary judgment on the  
21 issue of jurisdiction.

22 THE COURT: On the jurisdictional issue itself, just  
23 limited to the jurisdictional issue.

24 MR. YALOWITZ: I think we're going to cross-move on  
25 jurisdiction and capacity. As your Honor recalls, there was an

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1 issue of what is the PLO, what is the PA, and that issue was  
2 deferred, and I think that given some of the briefing, it's  
3 closely related to the jurisdictional issue and --

4 THE COURT: Well, if I deny their motion to  
5 reconsider, dismissing on jurisdictional grounds, what is the  
6 utility of your motion?

7 MR. YALOWITZ: My motion on summary judgment -- I'm  
8 sorry -- on jurisdiction will become moot. On capacity, it  
9 would eliminate a trial issue, which is -- the defendants plan  
10 to raise as a defense to the jury we're an unincorporated  
11 association and therefore we can't be sued under the nonfederal  
12 claims, and so having looked at that, I don't believe that  
13 they're correct about that and I think that's something that  
14 can be eliminated in advance of trial.

15 MS. FERGUSON: Your Honor --

16 THE COURT: Yes.

17 MS. FERGUSON: -- we have a schedule for filing  
18 motions for summary judgment and so I think it makes more sense  
19 to keep the summary judgment briefing on a similar schedule and  
20 not intertwine it with the jurisdictional issue, and if  
21 plaintiff needs to file a cross-motion for summary judgment and  
22 adds issues of capacity, then I would be filing an opposition  
23 brief, and I don't know exactly what they plan to raise in this  
24 cross-motion for summary judgment, so I may need more time now  
25 than April 1<sup>st</sup>, but I do think it makes more sense to keep

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1 the jurisdictional issues separate from motions for summary  
2 judgment briefing, if plaintiffs want to --

3 THE COURT: Well, plaintiffs, you don't intend to file  
4 any further summary judgment motions?

5 MR. YALOWITZ: I would say we haven't reached a final  
6 conclusion on that, your Honor. It's unlikely that we would  
7 file a summary judgment motion directed to the merits on  
8 anything other than what we might call "whodunit." There are  
9 21 individuals who were convicted of perpetrating many of the  
10 underlying terrorist acts, and we may seek summary judgment  
11 that those individuals who were convicted were involved in the  
12 acts, committed them, so that's something we're considering.

13 THE COURT: To what effect? Entering a judgment  
14 against them?

15 MR. YALOWITZ: It would be partial summary judgment,  
16 your Honor. They're not defendants.

17 THE COURT: Right. So that's what I'm saying. A  
18 number of these issues, I'm still keeping clear in my mind the  
19 difference between motions *in limine* that go to the proof as  
20 opposed to judgment in your favor, which is what I consider to  
21 be summary judgment motions, judgment in your favor on a claim  
22 against -- or dismissing a count.

23 MR. YALOWITZ: Right. So using --

24 THE COURT: You don't have such a motion.

25 MR. YALOWITZ: Correct, correct. You are correct,

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1 your Honor.

2 THE COURT: But the defendants still do have motions  
3 to dismiss claims against individual defendants.

4 MS. FERGUSON: Well, there are no individual  
5 defendants in the case anymore, your Honor, so --

6 THE COURT: I mean separate defendants.

7 MS. FERGUSON: Yes.

8 THE COURT: And you intended to file those motions  
9 when?

10 MR. YALOWITZ: March 21, your Honor. As your Honor  
11 says, whether you call it *in limine* or you call it, you know,  
12 partial summary judgment, I think you're correct. We're not  
13 looking for judgment on less than all claims anyway. March 21.  
14 The schedule that Judge Ellis set is March 21 for any summary  
15 judgment motion and any *in limine* motion, and I think the court  
16 should add to that any other sort of what you would call  
17 pretrial motion. For example, the defendants are saying they  
18 want to septifurcate or bifurcate or sever in some way. I  
19 think the court ought to have the benefit of that now. I can  
20 tell the court we think an anonymous jury is appropriate in  
21 this case. We're prepared to file our motion requesting such  
22 an anonymous jury on the same March 21 schedule so that in  
23 essence, the court has the parties' full trial position now,  
24 you know, in a few weeks, and then May 2 for oppositions,  
25 May 23 for replies, so that by Memorial Day, the court will

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1 have all the briefing that the parties expect to make on the  
2 various issues.

3 THE COURT: So you're prepared to file all your  
4 briefing on all issues that need to be decided before trial on  
5 March 21<sup>st</sup>?

6 MR. YALOWITZ: Yes, sir. The two things that I think  
7 we're not targeting for March 21 that we would need to find  
8 some date for with the court is requests to charge and jury  
9 questionnaire and possible, you know, voir dire questions. I  
10 can't think of anything else. I mean, you know, as your Honor  
11 knows, there are a lot of moving pieces, everybody's working  
12 hard to have everything in, lined up, but I think we'll be  
13 prepared to do that.

14 THE COURT: In light of that discussion, what schedule  
15 do you want?

16 MR. YALOWITZ: For the requests to charge and --

17 THE COURT: No. Forget about that. We can set that.  
18 That's easier to set. I'm just talking about for outstanding  
19 motions, summary judgment motions or motions that go to the  
20 admissibility of evidence or the appropriateness for witnesses  
21 to testify.

22 MR. YALOWITZ: I think both sides have agreed on the  
23 current schedule, which Judge Ellis' memo endorsed in my  
24 letter, and we think that's a good schedule.

25 THE COURT: All right.

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1                   MR. YALOWITZ: So March 21 for opposition to the  
2 motion to reconsider, any summary judgment motion, any *in  
3 limine* motion. I would add these other, you know, other  
4 pretrial motions like anonymous jury or motion to sever, May 2  
5 for oppositions to all those motions, May 23 for replies.  
6 That's a good schedule. I think we can live with that. Famous  
7 last words, but I --

8                   THE COURT: So what's the extent of your motions at  
9 this point?

10                  MR. YALOWITZ: So as I said, anonymous jury, capacity,  
11 summary judgment -- personal jurisdiction, and then we'll have  
12 some *in limine* motions directed to knocking out some of the  
13 defendants' evidence. For example, defendants have a number of  
14 law experts, people who know about various law, which I think  
15 is useful to the court but not appropriate for the jury. And  
16 we may -- we have certain other motions like that that I think  
17 are -- what we're trying to do is have them be targeted. And  
18 then of course, you know, the big issue which was the subject  
19 of our objection to Judge Ellis' ruling and which we need to  
20 find a process for is, the defendants have produced a number of  
21 very, very damaging documents to their case, very helpful  
22 documents to my case, things like the payroll records, things  
23 like their promotion records of terrorists who were convicted  
24 of mass murder and they're sitting in jail and they remain on  
25 the police force, getting their pay, getting their promotions

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1 and so forth. These are defendants' own documents which they  
2 insist have to remain confidential to protect their own  
3 interests, but they refuse to concede authenticity, they've  
4 refused to concede that they're either admissions or public  
5 records or business records. We need some either -- we need  
6 some ruling from the court, some way to get past that. I don't  
7 think it's really -- I mean, I understand they don't want to  
8 stipulate. They're allowed to not stipulate, if they have some  
9 reasonable basis. But to just say: Our own records are not  
10 admissible, they're not authentic, go pound sand --

11 THE COURT: I thought Judge Ellis indicated a process  
12 for that.

13 MR. YALOWITZ: I don't believe so, your Honor.

14 THE COURT: All right. Well, then, Ms. Ferguson, what  
15 do you want in terms of schedule?

16 MS. FERGUSON: Well, your Honor, we believe that the  
17 court no longer can exercise personal jurisdiction in light of  
18 these two recent Supreme Court rulings. We believe those are  
19 significant rulings. We believe that it makes imminent sense  
20 to stay this pretrial briefing process that we're discussing,  
21 which would be very burdensome and costly to our client and all  
22 over a case which we believe the court no longer has personal  
23 jurisdiction.

24 THE COURT: Well, what do you intend to file?

25 MS. FERGUSON: We have filed our motions for

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1 reconsideration arguing the personal jurisdiction issue --

2 THE COURT: Besides that.

3 MS. FERGUSON: -- and that will --

4 THE COURT: What do you intend to file with regard to  
5 summary judgment and motions *in limine*?

6 MS. FERGUSON: We intend to file a motion for summary  
7 judgment. We also intend to file motions *in limine* addressing  
8 particular categories of plaintiffs' exhibits. They've  
9 submitted 870 exhibits. Many of them are rank hearsay.  
10 There's a lot to deal with in terms of the exhibit list. They  
11 have 14 experts, most of which would just rely on hearsay. So  
12 we'll have *Daubert* motions as to some or all of those experts.  
13 Again, it's a significant undertaking. This is a complex case.  
14 There's no percipient witnesses here, there's no direct  
15 evidence of PA/PLO liability, so we just got this complex sort  
16 of mix of hearsay and lots of issues to work through before we  
17 could even I think wheel down the issue.

18 THE COURT: Let me put that aside for a minute. What  
19 is the extent of your summary judgment motion? What is the  
20 nature of your summary judgment motion?

21 MS. FERGUSON: The nature of it is to argue that even  
22 if there is admissible evidence as to PA employee involvement  
23 in some of the attacks, and we don't concede that there is,  
24 that there's no admissible evidence, no triable issue of fact  
25 of PA or PLO responsibility for these attacks. Plaintiffs are

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1 relying on very indirect theories of liability, with no  
2 evidence linking either PA or PLO as institutions for these  
3 attacks.

4 THE COURT: I assume that you are far down the road or  
5 the extent of that motion itself is such that it can be filed  
6 on March 21<sup>st</sup>, that motion alone.

7 MS. FERGUSON: Your Honor, there's a significant  
8 effort involved in dealing with huge categories of evidence,  
9 that many of the exhibits were just disclosed recently as part  
10 of the joint pretrial order process, and so, I mean, we can --  
11 in theory, yes, we could meet that deadline, but we think it  
12 makes more sense to resolve the personal jurisdiction issue.  
13 We think that our position is sufficiently credible that it  
14 warrants staying the pretrial briefing and it would just  
15 involve a relatively brief delay and we can get this briefed  
16 fairly quickly, and it's a significant enough issue that it's  
17 case dispositive and a threshold question that should be  
18 decided before we move to the merits.

19 THE COURT: How brief a delay are you anticipating?

20 MS. FERGUSON: Well, as I say, we could commit to  
21 getting our reply brief filed on April 1. If plaintiffs want  
22 to move up their opposition brief before March 21, we could  
23 move our reply brief up as well.

24 MR. YALOWITZ: Your Honor, may I be heard on this?

25 THE COURT: Yes.

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1                   MR. YALOWITZ: Because this is really a frivolous  
2 application. They have -- the defendants already asked that  
3 the pretrial proceedings be stayed. Judge Ellis denied that  
4 request. They're now taking a second bite at the apple, as is  
5 their habit, and, you know, we've heard -- I've heard two  
6 things from the defendants here today about this application.  
7 The first is that it's a credible position. I do not believe  
8 it's a credible position. Having done significant work in  
9 response to this motion for reconsideration, I can say -- I  
10 won't say that they're subject to Rule 11 for having made it,  
11 but I will say that it is a highly unmeritorious motion and it  
12 is not going to prevail.

13                  And the second thing I've heard from Ms. Ferguson  
14 today, as the defendants have said in the past, is that it's  
15 case dispositive. And it is not case dispositive. And if it  
16 were case dispositive, if they really believed it was case  
17 dispositive, then they would say, we don't need to do anything  
18 else, we don't need to file motion for summary judgment, we  
19 don't need to file motions *in limine*. Those are things that  
20 are optional for the defendants. They're not required to file  
21 a motion for summary judgment. And if they really believed  
22 that their motion for reconsideration was going to end the  
23 case, then they would put their money where their mouths are  
24 and they would stop talking about summary judgment and motions  
25 *in limine* and they would focus only on their personal

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jurisdiction, but their personal jurisdiction motion is not meritorious, it is not going to prevail, it is not going to prevent the trial of this action on the merits.

THE COURT: Well, with regard to your motions, I mean, I have three alternatives that I'm considering. One is staying with the same schedule that's already been set. Two is pushing back slightly the motions beyond the submission of the motion for reconsideration, which will be April 1<sup>st</sup> to a brief time after. If I get the motions on April 1<sup>st</sup>, I will probably schedule you to come in and I'll hear you further April 8<sup>th</sup>, or maybe even sooner than that. Maybe April 3<sup>rd</sup>. I'll read the papers as they come in and I'll be waiting for the reply April 1<sup>st</sup>. And so my second alternative is either to slightly push back the other motions to a date that all the parties feel that they can get in all of their motions on that date or simply pushing back the motions other than the summary judgment motion and giving that opportunity for the summary judgment motions to be filed on schedule and the other motions to be filed 30, 60 days beyond that.

MR. YALOWITZ: So I think that the current schedule is the one the court should stick with. I think that there are issues of personal jurisdiction that are closely intertwined with the merits. As I know your Honor is aware, when we look at specific jurisdiction, the question is the interrelationship between the defendant and the forum, which is the United

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1 States, and the claim, and here we know, because the court has  
2 found by a preponderance of the evidence, that the defendant  
3 was present on a systematic and continuous way promoting its  
4 political agenda. The claim is that the defendant engaged in  
5 violence in a way that, it appeared, intended to coerce a  
6 civilian population or to influence the policy of a government,  
7 and we have said from day one in this case that one of the  
8 governments the defendant was trying to influence -- the  
9 defendants were trying to influence through their terrorism was  
10 the United States government, and so when we look at the  
11 evidence on personal jurisdiction with regard to specific  
12 jurisdiction, it will be closely related to the evidence on the  
13 merits, and I think the court will benefit from seeing both of  
14 those motions together.

15 THE COURT: Well, both of those motions are simply  
16 motions that deal with jurisdiction.

17 MR. YALOWITZ: No, I mean the merits. The defendants  
18 are moving for summary judgment on the merits and one of the  
19 elements on the merits is that their conduct appeared to be  
20 intended to influence the United States and then all of their  
21 United States conduct is relevant, is related to their attempt  
22 to influence the United States. And so on specific  
23 jurisdiction, the issue of jurisdiction and the issue of the  
24 merits are closely intertwined. So I think the court would  
25 benefit from deciding both motions together. However, it's

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1 really up to the court. We're willing to go faster on any of  
2 the motions or all of the motions. If the court wants to have  
3 the defendant reply on April 1 and have the parties in on  
4 April 3, I'm fine with that.

5 THE COURT: Are you prepared to file all of your  
6 motions on March 21<sup>st</sup>?

7 MR. YALOWITZ: Yes, sir. In fact, that's the current  
8 schedule. That's the schedule that Judge Ellis has ordered the  
9 parties to plan for --

10 THE COURT: I understand.

11 MR. YALOWITZ: -- and I think that anybody who stood  
12 before you and said they weren't prepared to live by that  
13 schedule today on March the 4<sup>th</sup> would be pretty irresponsible.

14 MS. FERGUSON: Your Honor --

15 THE COURT: Yes.

16 MS. FERGUSON: -- the basis for our motion for  
17 reconsideration was general jurisdiction. This court does not  
18 have general jurisdiction. The plaintiffs don't really attempt  
19 to defend how this court can continue to exercise general  
20 jurisdiction. They've now switched to a different theory,  
21 under specific jurisdiction. The new Supreme Court case that  
22 came out completely undercuts the theory of specific  
23 jurisdiction that plaintiffs have laid out, including here  
24 today. There have to be contacts with the forum itself. There  
25 is no lawsuit-related activity by the PA or PLO in the United

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1 States. Therefore, there can be no specific jurisdiction.  
2 They did not plead any such contacts, we've had personal  
3 jurisdiction -- sorry -- personal discovery in this case. No  
4 such forum-related activity having any connection to this  
5 lawsuit was identified. The only forum-related activity  
6 identified as a result of personal jurisdiction discovery was  
7 the Washington, DC office of the PLO mission to the United  
8 States and a contract with the Bannerman Consulting firm.  
9 Those were the US contacts. They are not forum related.  
10 Hence, when plaintiffs previously argued there was specific  
11 jurisdiction, the court didn't rest its exercise of  
12 jurisdiction on specific jurisdiction, which requires that the  
13 contacts of the forum be lawsuit related. Instead, the court  
14 found that the presence of the DC office of the PLO mission to  
15 the United States was continuous and systematic and established  
16 general jurisdiction. The Supreme Court has now made clear  
17 that continuous and systematic contact with the forum are not  
18 enough unless the defendant is at home in the forum. There is  
19 no credible basis for arguing that the Palestinian Authority or  
20 PLO are at home in the United States. This new Supreme Court  
21 case, which came out just at the end of February, is another  
22 attempt by the Supreme Court to make clear that US courts are  
23 not to be taking these sorts of cases which have no nexus to  
24 the United States whatsoever. This is a lawsuit about attacks  
25 in Jerusalem. The defendants are foreign. All of the contacts

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1 alleged to have occurred occurred overseas. This has no nexus  
2 to the United States. We have more than a credible basis for  
3 arguing that the court lacks personal jurisdiction. We have an  
4 incredibly strong basis -- but I know the court is not going to  
5 decide that here today. My point is that it is sufficiently  
6 strong that I think it's important to stay this very burdensome  
7 and costly pretrial briefing, in a case where there has been a  
8 significant game change by two recent Supreme Court decisions  
9 on jurisdiction. And jurisdiction is a threshold question that  
10 needs to be reached before the court turns to the merits. We,  
11 PA/PLO, should not be sued in the United States just because we  
12 had a mission office in Washington, DC. And that's what  
13 happened, and the Supreme Court has made clear that's not how  
14 jurisdiction is supposed to work. And their new theory about,  
15 you know, about whether the PA, you know, intended to target US  
16 residents in some way, the Supreme Court has rejected in this  
17 new case involving specific jurisdiction. So --

18 THE COURT: This is what I'm willing to do. As I say,  
19 I want the submissions on the motion to reconsider fully  
20 submitted by April 1<sup>st</sup>. I'm going to set it down for  
21 April 8<sup>th</sup>, Tuesday, April 8<sup>th</sup>.

22 MS. FERGUSON: Thank you, your Honor.

23 THE COURT: I'm going to give plaintiffs this choice.

24 MR. YALOWITZ: What time, your Honor?

25 THE COURT: 10:30. I'm going to give plaintiffs this

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choice. I'm willing to adjust the schedule for the defendants to file any summary judgment motions or motions *in limine* to the May 2<sup>nd</sup> date rather than the March 21<sup>st</sup> date.

MR. YALOWITZ: We really would rather keep the case moving, your Honor, get all the briefing in.

THE COURT: I understand.

MR. YALOWITZ: We don't think it's going to be a problem.

THE COURT: Well, but the choice that I'm giving you is that if you want to file your motion March 31<sup>st</sup> --

MR. YALOWITZ: March 21.

THE COURT: Yes, March 21<sup>st</sup>, then I am going to require that they still reply, respond to your motion by May 2<sup>nd</sup>. But I won't require that they have to file their motion until May 2<sup>nd</sup>. Now if you want both motions to be filed at the same time, then we can do that, but if you want to move it along, you can file your motions. You know --

MR. YALOWITZ: Your Honor, let me reflect on it. I really think you're letting them get away with foot dragging, that that's the name of the game here.

THE COURT: Well, going from March 22<sup>nd</sup> to May 2<sup>nd</sup> is not significant foot dragging.

MR. YALOWITZ: Could we set it for April 15<sup>th</sup> instead of May 2?

THE COURT: No. I'm going to either resolve their

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1 motion on April 8<sup>th</sup> or soon thereafter and I will give them  
2 several weeks to make sure they have full and complete  
3 opportunity to file all their motions because my intent is to  
4 deny any subsequent motions if they have not been filed timely  
5 and if there's not a good reason why those motions weren't  
6 filed on those dates. So even if I have their motion filed by  
7 May 2<sup>nd</sup>, I'll give you whatever amount of time that you want  
8 to respond to those motions, shorter or longer, so that those  
9 motions can be fully submitted in June and resolved in June.

10 MR. YALOWITZ: So I'm wondering, your Honor, if -- is  
11 it possible to -- well, let me reflect on it for a moment and  
12 speak to my colleagues. I guess I'm wondering if the court  
13 would -- well, the timing that the court is suggesting is May 2  
14 for motions, sometime in early June for oppositions.

15 THE COURT: Unless you want to do it sooner.

16 MR. YALOWITZ: Well, we need to --

17 THE COURT: Sounds like you're going to have more work  
18 to do on oppositions than them, so you have to tell me what you  
19 think is a reasonable amount of time.

20 MR. YALOWITZ: That's the problem, candidly, is that,  
21 you know, the defendants are ready to go March 1 -- I'm  
22 sorry -- March 21, they're ready to go, and so by giving them a  
23 delay in filing their motions, all you do is give them a  
24 tactical advantage of jamming me up on the back end. You know,  
25 that's the real problem. We then start to stretch the motions

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1 into the summer. But I think that's -- if your Honor's not  
2 going to hold their feet to the fire --

3 THE COURT: I want fully submitted motions before the  
4 end of June, and the schedule at this point is fully submitted  
5 motions before Memorial Day. So I mean, that concession to  
6 them only gives me a greater opportunity to be tougher on  
7 motions that people want to make subsequent to that and  
8 demanding an explanation why those motions weren't made, having  
9 had a full opportunity to fully submit all the motions as is  
10 contemplated by Magistrate Judge Ellis' schedule.

11 MR. YALOWITZ: And by the way, while we're on that  
12 topic, your Honor, I should say this motion for reconsideration  
13 should have been made two and a half years ago when the Supreme  
14 Court announced the essentially at home test in the *Goodyear*  
15 case. So one of the reasons why this motion is not meritorious  
16 is because it's quite late.

17 THE COURT: Well, their argument is not based on the  
18 *Goodyear* case. It's based on --

19 MR. YALOWITZ: I understand.

20 THE COURT: -- the *Daimler* case.

21 MR. YALOWITZ: I'm sorry, your Honor. I didn't mean  
22 to interrupt you.

23 THE COURT: On the *Daimler* case.

24 MR. YALOWITZ: I understand that. I understand that.

25 THE COURT: That's the basis for their motion to

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1 reconsider. So the only question before me is: Does the  
2 *Daimler* case change the law? And that's a fairly  
3 straightforward issue for me to address.

4 MR. YALOWITZ: Agree. Agree.

5 THE COURT: So the only thing that I think, in  
6 fairness and generosity, is to say to them: You're right. If  
7 there's a possibility that you can convince me that this case  
8 should be dismissed solely on jurisdictional grounds and the  
9 merits of the case not addressed, then you should have the  
10 opportunity to present that to me and for me to at least be  
11 able to review that before you have to file motions that would  
12 be unnecessary. I don't anticipate that. That's the status  
13 that we're in. The status that we're in is rulings have been  
14 made and unless those rulings have changed, we're going forward  
15 with trial. But my suggestion would be May 2<sup>nd</sup> for their  
16 and/or your motions. May 30<sup>th</sup>. Unless you want more time.

17 MR. YALOWITZ: I think I would like five weeks, your  
18 Honor.

19 THE COURT: June 6<sup>th</sup>. June 6<sup>th</sup> for response.  
20 And --

21 MR. YALOWITZ: June 28<sup>th</sup>, perhaps?

22 THE COURT: June 28<sup>th</sup> is a Saturday. I was thinking  
23 more of June 23<sup>rd</sup> for reply.

24 MR. YALOWITZ: Okay.

25 THE COURT: Monday, June 23<sup>rd</sup> for a reply. And

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1 setting it down for June 26.

2 MR. YALOWITZ: I'm sorry. June 26?

3 THE COURT: Yeah, Thursday, June 26, to be heard.

4 MR. YALOWITZ: 10:30?

5 THE COURT: Yes. So the motions will be fully  
6 submitted and argued by June 26, which gives us plenty of time  
7 to resolve whatever could be resolved right then and there and  
8 to discuss, you know, and resolve in the next 30 days from now,  
9 all of those issues so we'll know how this trial is going to  
10 proceed. And I would anticipate scheduling a conference maybe  
11 in September, see where we are, and giving you a different  
12 opportunity -- I would take out of the schedule issues that you  
13 raised. I don't remember all of them you raised, but issues  
14 with regard to jury selection and with regard to, you know,  
15 anonymous jurors and the issues related to jury instructions,  
16 those kinds of things. I would put that on a schedule so we  
17 can have that in September. Which is plenty of time for you  
18 to --

19 MR. YALOWITZ: That would be great.

20 So with regard to my motion for an anonymous jury, the  
21 defendants' motion for severance, would the court want that on  
22 the May 2 schedule or --

23 THE COURT: No.

24 MR. YALOWITZ: -- later so that we would have it fully  
25 briefed by Labor Day and then we could come in and see your

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1 Honor?

2 THE COURT: That's what I would want, fully briefed by  
3 Labor Day, because then I'll have already had an opportunity to  
4 deal with the more substantive issues, to deal with the motions  
5 *in limine*, see exactly how the case is supposed to be laid out  
6 and make a, you know, pretty quick decision, probably at that  
7 conference, as to how we're going to proceed procedurally on  
8 those issues. So quite frankly, I leave that up to you. If  
9 you agree upon a schedule for that, that we'll have it fully  
10 submitted before the end of July.

11 MR. YALOWITZ: So, I'm sorry. I just --

12 THE COURT: Not a problem.

13 MR. YALOWITZ: That sounds great. I just want to make  
14 sure I understand clearly. I have sort of a bucket of kind of  
15 five items: severance, anonymous jury, voir dire, requests to  
16 charge, and jury questionnaire. There may be something I'm not  
17 thinking of, but those are the five, the big five, if you will.

18 THE COURT: Sure.

19 MR. YALOWITZ: And did your Honor want to -- and I  
20 believe the parties can work together on scheduling, to tee  
21 those up for the court.

22 THE COURT: Right.

23 MR. YALOWITZ: The question is, do you want them --  
24 when would the court wish to have those issues ready for the  
25 court to address?

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1                   THE COURT: Before Labor Day.

2                   MR. YALOWITZ: Okay.

3                   THE COURT: And so, quite frankly, if you agreed upon  
4 a schedule that began in July, mid July on those issues, then  
5 you would start thinking about those issues and working on it  
6 anyway, but mid July submission and mid July/early August  
7 response and late August reply. I'll have the papers on all of  
8 those issues, and I'm talking about procedural issues. I'm not  
9 talking about, you know, issues that go to the admissibility of  
10 evidence, which I believe is appropriate for the motions *in*  
11 *limine*, and I'm not talking about any issues that go to  
12 judgment in or against any party, which I believe requires  
13 summary judgment.

14                  MR. YALOWITZ: So the schedule and the contours that  
15 the court has laid out are agreeable to the plaintiffs, your  
16 Honor.

17                  THE COURT: And this is what I expect. I expect one  
18 summary judgment motion and I expect one motion *in limine*. All  
19 right? I don't expect ten different motions, similar motions  
20 *in limine*, and I don't expect ten different summary judgments,  
21 all right?

22                  MS. FERGUSON: Your Honor, if I could address that.

23                  THE COURT: Yes.

24                  MS. FERGUSON: With the motions *in limine*, there are  
25 many categories of evidence, and I'll just give you one

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example, since the plaintiffs have relied a lot on convictions of Israeli military tribunals so they could establish employee involvement. There are a whole set of issues involving whether military tribunal convictions are admissible. And that is just one issue. There are multiple issues that are raised by --

THE COURT: I want it in one document.

MS. FERGUSON: Then I guess we need a page limit then.

THE COURT: You tell me. Beyond 25 pages, how many more pages, depending on how many separate issues you want to raise, do you think are necessary?

MS. FERGUSON: So --

THE COURT: Because you'll use as much as I give you is the basic rule. So if I give you 25 pages, separate motions on every issue, I'm sure I'll get 25 pages. That's not what I expect to happen. So you should, you know, tell me, if you believe it takes more than 25 pages, how much more than 25 pages it takes because of the number of issues, and then I'll consider whether I'll extend your page limit.

MS. FERGUSON: This is an important issue. Can I consult with my colleagues and then we can move for a page extension?

THE COURT: Yes.

MS. FERGUSON: Thank you.

THE COURT: What I'll also do is then I'll also say that we'll have a conference --

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1                   MR. YALOWITZ: I'm sorry. Was the application that we  
2 not decide that now, your Honor?

3                   THE COURT: They wanted to determine how much, if any,  
4 additional pages they wish to seek, and I assume they should  
5 consult with you, find out whether you have an objection to  
6 that being the page limit for both.

7                   MR. YALOWITZ: One would hope that we would consult.

8                   THE COURT: Yes. And then otherwise they'll request  
9 what they think is reasonable and you can object to it and then  
10 I'll decide. You should let me know that before -- well, you  
11 know what, you can let me know that on or before the 8<sup>th</sup> when  
12 you come in, April 8<sup>th</sup>.

13                  MS. FERGUSON: Thank you, your Honor.

14                  THE COURT: The earlier the better. If you disagree,  
15 or even if you agree. And I think I'm going to set this down  
16 for September 16<sup>th</sup> for a conference. September 16<sup>th</sup>. Is  
17 that a problem?

18                  MR. HILL: September 16<sup>th</sup> is fine, your Honor. I  
19 was going to ask about the April date. As it turns out, I'm  
20 supposed to be out of town on April 8<sup>th</sup>. I'm wondering if we  
21 could push that back just one week.

22                  MR. YALOWITZ: Or maybe earlier, your Honor. Because  
23 after April 8<sup>th</sup> is Passover. That's a problem.

24                  THE COURT: I don't have my calendar.

25                  MR. YALOWITZ: I'm afraid I'm handicapped in that way

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1 too. My Southern District pass is expired so I had to leave my  
2 calendar with the marshals.

3 THE COURT: I think Passover is the 14<sup>th</sup>. Monday,  
4 the 14<sup>th</sup>.

5 MR. TOLCHIN: And that whole week.

6 THE COURT: That's an awkward time.

7 MR. YALOWITZ: Right.

8 THE COURT: So you're unavailable on April 8<sup>th</sup> or  
9 that whole week?

10 MR. HILL: I have spring break that week with my  
11 children, your Honor. I'd like to take that trip.

12 MR. YALOWITZ: Could we do it earlier than  
13 April 8<sup>th</sup>, your Honor?

14 MR. HILL: If the plaintiffs want to file their  
15 opposition sooner, we can file our reply sooner, it can be  
16 briefed up the prior week, if your Honor would prefer.

17 THE COURT: Well, if you can agree to sooner filings.  
18 But that's fine. I'll read everything before April 1<sup>st</sup>  
19 except the reply. I'll give you either Thursday the 3<sup>rd</sup> or  
20 Friday the 4<sup>th</sup>.

21 MR. ROCHON: Your Honor, if we can just only address  
22 that issue that day, then it's not convenient for me, but I'm  
23 well represented by my two colleagues and I'd absent myself.

24 THE COURT: Which day?

25 MR. ROCHON: I'll be gone the end of that week, but

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1 Ms. Ferguson or Mr. Hill will be arguing the personal  
2 jurisdiction issues, not me, and if that's what that hearing is  
3 going to focus upon, then with your permission, I'd absent  
4 myself.

5 THE COURT: Sure.

6 MR. ROCHON: Thank you.

7 THE COURT: So what would be better, the 3<sup>rd</sup> or the  
8 4<sup>th</sup>, Thursday or Friday?

9 MR. HILL: Friday morning, the 4<sup>th</sup>.

10 THE COURT: All right. Then that will be Friday the  
11 4<sup>th</sup>, at 10:00. All right? So we can address that. All right.  
12 So that's the schedule that I think we should proceed on, and  
13 I'm going to stick with that schedule. The only thing that's  
14 still outstanding is you need to get to me with regard to page  
15 limits.

16 MS. FERGUSON: Yes, your Honor.

17 THE COURT: And you need to tell me what the schedule  
18 is, and I'm going to anticipate receiving the other motion to  
19 be fully submitted before the end of August and then we'll meet  
20 on the 16<sup>th</sup> of September.

21 MR. YALOWITZ: Your Honor, I don't have my calendar.  
22 Could I indulge the court to just look and see when the Jewish  
23 high holidays are.

24 THE COURT: Oh, in September.

25 MR. YALOWITZ: I believe they're later, but I just

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1 don't have it in the front of my mind. I don't think the  
2 16<sup>th</sup> is a problem because of that.

3 THE COURT: I have Rosh Hashanah on the 24<sup>th</sup> of  
4 September.

5 MR. YALOWITZ: Okay. Great. So then we're good on  
6 the 16<sup>th</sup>.

7 THE COURT: That's Wednesday the 24<sup>th</sup> at sundown,  
8 and we're talking about meeting on Tuesday, the 16<sup>th</sup>.

9 MR. YALOWITZ: Perfect. Okay. Thank you. I really  
10 do apologize.

11 THE COURT: No problem.

12 Okay. So that deals with those issues. I'm holding  
13 up another argument, so let me just quickly address -- I'm not  
14 going to be able to resolve all these issues now. I mean, just  
15 tell me the last word on where you were with the BBC. What did  
16 you get? And just tell me briefly. Now that you've done other  
17 discovery since this issue first arose, I'm not sure what you  
18 are looking for.

19 MR. YALOWITZ: Sure. So the BBC program is, you know,  
20 useful and important evidence.

21 THE COURT: So what do you expect in the outtakes?  
22 You want to look at the outtakes so you see if something's  
23 going to be helpful or something you anticipate that --

24 MR. YALOWITZ: Right. We think there could be  
25 inculpatory evidence in the outtakes and we'd like to see --

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1                   THE COURT: Based on what?

2                   MR. YALOWITZ: Based on the fact that the program had  
3 highly inculpatory statements that were aired.

4                   THE COURT: Well, what is it that you think you might  
5 find that you didn't already have by the program and you didn't  
6 find elsewhere?

7                   MR. YALOWITZ: Well, it's a black box to us, your  
8 Honor.

9                   THE COURT: That's what I'm trying to figure out, why  
10 your interest in the outtakes is more compelling than their  
11 interest in protecting it.

12                  MR. YALOWITZ: Sure. I understand there's a balance  
13 to be made, and it's our view that there may be something  
14 useful and --

15                  THE COURT: Well, give me an example of how you would  
16 hit the jackpot.

17                  MR. YALOWITZ: Well, you know, I think, frankly, the  
18 big concern I have is that the defendant will say that the  
19 program as aired had questions and answers that were taken out  
20 of context, or they'll object in some way to the admissibility  
21 of the program because it's incomplete, and so if we have the  
22 outtakes, we can meet that objection, even if they're not --

23                  THE COURT: If that objection is overruled, then  
24 what's the purpose of the evidence?

25                  MR. YALOWITZ: I think, frankly, if that objection is

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1 overruled, we're in a lot safer ground.

2           The other thing that concerns me about the intakes is  
3 that it has a -- as aired, the program has a voiceover, so --

4           THE COURT: Interpreter voiceover?

5           MR. YALOWITZ: Correct, correct, correct.

6           THE COURT: Okay.

7           MR. YALOWITZ: So I expect to hear an objection from  
8 the defendants that we have no basis to say that the  
9 interpreter was correctly interpreting.

10          THE COURT: Well, I can tell you my approach on that,  
11 and I'll give them full opportunity to make that argument. My  
12 approach on that is not much different than any other tape  
13 recording and transcript and translation of the transcript. If  
14 they got an expert who wants to come in and say that's not what  
15 was said, that's fine. You bring in your expert to say, that  
16 is what he said. That doesn't go to the admissibility as far  
17 as I'm concerned, as it wouldn't go to the admissibility of, in  
18 a drug case or where they're speaking, you know, another  
19 language, speaking Spanish and then it's interpreted by an  
20 interpreter and the translation and transcript done in English  
21 and both sides can fight over whether they say it's an accurate  
22 translation and they can provide their own transcript if they  
23 think there's a different transcript to be provided, but unless  
24 they tell me that they have an expert who's going to come in  
25 and say that that's an inaccurate translation, that's not an

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1 issue as far as I'm concerned, and even if that is what their  
2 expert's going to say, my initial reaction would be, well, then  
3 you bring in your expert to say that. I mean, they don't want  
4 to say to the jury that it's accurate and the other side can  
5 put on somebody who understands the language and who wants to  
6 say that it's not accurate. That doesn't go to its  
7 admissibility as it wouldn't go to the admissibility with  
8 regard to any other witness, a nonEnglish-speaking translation  
9 that is translated.

10 MR. YALOWITZ: I agree with that approach, your Honor.  
11 I think the argument will be from the defendants that the  
12 program as aired doesn't actually -- you can't actually hear  
13 the underlying Arabic so the -- and I'm sure you've seen these  
14 news type programs where they interview someone in a foreign  
15 language and the individual starts to speak in their native  
16 tongue and the engineers at the news program lower down their  
17 voice and bring up the voice of the translator.

18 THE COURT: Okay.

19 MR. YALOWITZ: So my concern is that without the  
20 original recordings, there will be a dispute about whether the  
21 BBC's translation is fair and the argument from the defendants  
22 will be, without the outtakes, we don't have any way to test  
23 whether or not the translation is fair. So I agree with your  
24 approach. I'm concerned about -- kind of a little different  
25 area to worry about.

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1                   THE COURT: Well, obviously I haven't seen the video  
2 so I don't know to what extent you claim that it is impossible  
3 even with enhancement to hear what the speaker has said in  
4 Arabic.

5                   MR. YALOWITZ: I certainly don't know the enhancement  
6 technology.

7                   THE COURT: Well, even without the enhancement, I  
8 don't know to what level you indicate that you can't hear.

9                   MR. YALOWITZ: I'm saying they drop it down, they drop  
10 it down and so really the audience is hearing the English.

11                  THE COURT: And an Arabic translator cannot hear what  
12 is being said in Arabic on the tape, even if you turn it up?

13                  MR. YALOWITZ: Your Honor, before making a  
14 representation to the court on that, I'd want to go back and  
15 check on that.

16                  THE COURT: All right.

17                  MR. YALOWITZ: I believe that's the case, but I'd  
18 really want to double-check before representing a fact to your  
19 Honor about that because I just -- I don't have it clear in my  
20 mind.

21                  THE COURT: Well, I'm just not sure how any of these  
22 issues will be decided by the outtakes.

23                  MR. YALOWITZ: Well, it may be something that -- I  
24 know that in the postargument briefing there was discussion of  
25 *in camera* submission, and I hate to burden the court with

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1 something like that.

2 THE COURT: It's not burdening court, but I'm the  
3 least qualified to listen to the tape --

4 MR. YALOWITZ: Particularly in Arabic, yeah.

5 THE COURT: -- and that it's somehow relevant if I  
6 can't understand what they're saying, or if I can't hear what  
7 they're saying. Even if I understood, I couldn't hear. So I'm  
8 not sure an *in camera* review would give either you or me a  
9 meaningful answer.

10 MR. YALOWITZ: I think the outtakes are the best  
11 solution to deal with these problems, but --

12 THE COURT: I understand that. I will give you a  
13 final decision on that in the next few weeks. I still have to  
14 go back and review what my notes were, but my inclination, I  
15 can tell you at this point, is -- and I've spoken to Magistrate  
16 Judge Ellis about this issue -- is to overrule Magistrate Judge  
17 Ellis on that issue. It doesn't seem to me that the arguments  
18 that have been put forward before him in writing or today  
19 orally are so compelling that it should overcome their interest  
20 in keeping the outtakes confidential. I think that to the  
21 extent that you believe that the information -- the way I  
22 understand it is, you believe that the statements made on the  
23 tape, if the tape is admissible, provide the adequate and the  
24 type of evidence that you wish to present from that witness.  
25 And if that is the case, then the only question I hear you

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1 arguing is, they may try to make an argument to preclude the  
2 tape as inadmissible because you don't have the outtakes.

3 MR. YALOWITZ: I believe that you fairly capsulated  
4 it, your Honor.

5 THE COURT: I mean, I think they need to give me a  
6 more compelling argument -- since they don't know what the  
7 outtakes have to say, they need to give me a more compelling  
8 argument that somehow there's a basis to believe that whatever,  
9 in whatever form this is offered, whether by stipulation or by  
10 certification or by testimony, that somehow, the question about  
11 whether it is what it purports to be and all it is, as far as I  
12 know and purports to be, is an interview of an individual and a  
13 question and answer period and to the extent that it was aired,  
14 the question and answer that were given by the witness -- now  
15 since they don't have the outtakes, I don't know how compelling  
16 an argument they can make that somehow it's a misrepresentation  
17 of what he meant to say without the outtakes or it's  
18 inadmissible. How would they know that? Unless they have a  
19 real compelling argument to make that somehow this is not what  
20 the person said and somehow this is not an accurate translation  
21 and give me some specific indication that they believe this is  
22 beyond just general admissibility, that it is unreliable as to  
23 what it purports to be, I mean, if they make an argument  
24 against its admissibility, it seems to me that -- and I haven't  
25 heard such an argument here and it seems to me that that

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1 decision can be made regardless, if not dependent on whether  
2 they're outtakes or not outtakes -- or, frankly, I'm not sure  
3 in any circumstance why that is a determinative factor as to  
4 whether or not it's admissible or not. If they want to come in  
5 and argue that it's not a complete statement of what he had  
6 said, then they're going to have to offer some evidence that he  
7 said something else different someplace else, if they have such  
8 evidence. They know what the outtakes say or they have some  
9 witness who was saying I was there and that's not what he said  
10 or there's a conflict or he changed that statement or that's  
11 not what he meant. But I'm going to take one final look at  
12 that time and see whether or not, given the BBC's argument that  
13 they made a immediate subsequent discovery, but I assume over  
14 the month the subsequent discovery has not uncovered anything  
15 compelling one way or the other. It may make your argument  
16 either weaker or stronger than the argument that you made, with  
17 regard to admissibility, and the other side could tell me now  
18 or at the appropriate time when the motion *in limine* are filed  
19 whether they have an objection to that tape and on what basis.  
20 But obviously otherwise the issue of authenticity and  
21 admissibility, you know, those are burdens that they're not  
22 going to stipulate to that you have, and you have to tell me  
23 how you expect to lay the proper foundation and establish the  
24 admissibility.

25 MR. YALOWITZ: Sure. So with regard to the BBC, your

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Honor, I think you've summarized the issues well. The issue was briefed quite extensively, and I don't think that we have anything to add with regard to the outtakes.

I should also report to the court that despite very good faith efforts, both on the part of BBC's counsel and on our part, we've not been able to get a certification from the BBC that the take that we have or the CD that we have now, or CDs, is an accurate copy of what aired, although we did receive it directly from the BBC. So that issue is also before the court, and I may be misremembering, but I think Judge Ellis did give us that discovery and we haven't pursued it because --

THE COURT: To do what?

MR. YALOWITZ: To get perhaps an authenticating deposition or some third-party discovery device simply to say this is indeed a true and correct copy of what we aired and our procedures were followed here and so on. And there is a recent decision which we didn't burden the court with, but I'll tell you, Judge Scheindlin had a recent decision in *Wultz v. Bank of China* on a similar issue involving an Israeli bank called Bank Hapoalim, and I'd be happy to send a copy of that decision to the court if it would be helpful.

THE COURT: Well, this is what I --

MR. YALOWITZ: But that's a separate issue.

THE COURT: This is what I want. Even before you file any motions *in limine* with regard to the admissibility of

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1 evidence, to the extent that you believe that it would be  
2 appropriate, both sides, you believe it would be appropriate  
3 for the other side to stipulate to the authenticity,  
4 admissibility, part or all of the foundation for admissibility,  
5 you should seek that, you should identify it and request it  
6 from the other side, in writing, by letter, and they should  
7 respond to that within ten days, calendar days, as to whether  
8 or not they're going to agree to that. If they're not going to  
9 agree to it, then you'll know what you need to fight about with  
10 other additional efforts that you have to take to be able to  
11 get the appropriate witness to lay the proper foundation.

12 MR. YALOWITZ: Thank you, your Honor.

13 THE COURT: To the extent that there is the rule that  
14 examines the reliability of the evidence beyond just the  
15 particular rules with regard to foundation, I'll consider it if  
16 it is appropriate, but at this point I'm not going to represent  
17 that I'm going to relieve either party of their obligations to  
18 demonstrate that any evidence that they wish to offer is in  
19 fact what it purports to be, by testimony, certification,  
20 and/or other indicia of reliability, so that we can address  
21 those issues as you raised them, that they lack the proper  
22 authority, a waste of time, or to spend the time establishing  
23 full foundation when there's no real genuine dispute that the  
24 item is what it purports to be. See if we can address that.

25 MR. YALOWITZ: All right. That narrows the other

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1 objection we raised with regard to Judge Ellis' order, so  
2 that's fine. We'll take it to the defendants in that way. I  
3 will say, I'm not optimistic that we will get stipulations, but  
4 I think the exercise is worth doing.

5 THE COURT: Well, but at least you can make a  
6 judgment, one, as to whether or not you believe it's going to  
7 be required or necessary for you to bring in foundational  
8 witnesses, or you can make the appropriate application early  
9 on.

10 MR. YALOWITZ: Right. I mean, foundational --

11 THE COURT: Even before you file the motions *in limine*  
12 to indicate that you want to offer that evidence over the  
13 defense objection without having a foundational witness.

14 MR. YALOWITZ: Right. You know, admissibility,  
15 foundation, authenticity, these are matters for the court under  
16 Rule 104. They're really not for the jury.

17 THE COURT: Right.

18 MR. YALOWITZ: So --

19 THE COURT: Well, I intend to make those rulings as  
20 far in advance of the issue being raised before the jury as  
21 possible.

22 MR. YALOWITZ: Right.

23 THE COURT: And to the extent I can resolve those  
24 issues prior to trial, I will resolve those issues as early as  
25 I get those issues teed up.

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1                   MR. YALOWITZ: That's great. In that regard, if we  
2 can't stipulate and there are genuine issues -- so the  
3 documents that I have the biggest concern about, because  
4 they're -- well, the documents that I have the biggest concern  
5 about are the defendants' own documents. Defendants had the  
6 documents produced to us in discovery, most of which the  
7 defendants produced, as the court recalls, after the close of  
8 discovery; some of which we got only last month, for example.  
9 And those are, it seems to me, pretty obviously either  
10 admissions or public records or business records, or something  
11 like that. And there are a lot of cases that say that even  
12 without a witness sitting there going through 600 pages of  
13 documents saying, yup, that's it, that the court can still make  
14 findings in that regard based on the face of the documents and  
15 the fact that they were produced by the defendants, unless the  
16 defendants come forward with some reason to think they're, you  
17 know, forgeries or something like that. So -- which we haven't  
18 heard here. So I think that this is -- it's good that we try  
19 to resolve this now, and we'll go back to the defendants to see  
20 if we can get stipulations. If we can't, we'll bring it to the  
21 court, you know, in the context of the other --

22                   THE COURT: And I anticipate that I can resolve most  
23 of those issues even, if you raise them early enough, by the  
24 September conference. Then to the extent that there are issues  
25 that have not been addressed by the September conference, we

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1 can resolve those by the November 20<sup>th</sup> --

2 MR. YALOWITZ: Excellent.

3 And the only other agenda item that I think I have  
4 that I want just to make sure is on your radar screen, your  
5 Honor, is the issue of public filing of judicial documents.

6 THE COURT: Right.

7 MR. YALOWITZ: And I don't know if your Honor would  
8 like to hear from the parties on that or --

9 THE COURT: Well, just tell me again. I'm not sure I  
10 understand in general the extent or the limit of what you want  
11 publicly filed and what you don't want publicly filed.

12 MR. YALOWITZ: Sure.

13 MR. HILL: Your Honor, I hate to interrupt, but we can  
14 avoid talking about the substance since there are people in the  
15 room that are not under the protective order.

16 MR. YALOWITZ: All right. Well, we're --

17 THE COURT: That's fine. That's fine. I'm just  
18 trying to figure it out. You want to file documents, you want  
19 all documents to be public, is that basically your position?

20 MR. YALOWITZ: Close to my position, your Honor.

21 THE COURT: Okay.

22 MR. YALOWITZ: Yes. For the most part, the trial  
23 should be conducted in public.

24 THE COURT: I understand. Well, then, you know, I  
25 mean, you don't even think that it's appropriate for any

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1 confidentiality order or stipulation with regard to the use of  
2 documents?

3 MR. YALOWITZ: The only thing, there are -- the Second  
4 Circuit has said that there are certain kinds of documents that  
5 are highly private. And we have a few of those documents here,  
6 your Honor. For example, photographs of gruesome injuries of  
7 some of the plaintiffs that they just are embarrassed and don't  
8 wish to be seen.

9 THE COURT: Well, that's a different issue. That's a  
10 different ground, if they move to either exclude or to somehow  
11 limit that evidence because of its prejudicial nature or some  
12 other ground, but the bottom line is that this is really not  
13 your application at this point. Your application is that all  
14 documents produced before the jury should be public.

15 MR. YALOWITZ: Correct, and all documents supporting  
16 or opposing summary judgment, and this issue was -- this issue  
17 first arose because we had a sentence in our description of the  
18 claim, in the joint pretrial order, that referenced certain  
19 records of the defendant.

20 THE COURT: I understand that, but at this point  
21 nothing has been filed.

22 MR. YALOWITZ: Correct.

23 THE COURT: The pretrial order has not been filed.

24 MR. YALOWITZ: Correct. We've submitted it --

25 THE COURT: The only ruling I'm going to make at this

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1 point is that you should discuss it. To the extent you have,  
2 to the extent the defendants have a position that certain  
3 documents or information should not be publicly filed, then it  
4 should not be publicly filed until you get a ruling from the  
5 court, and I'll hear whatever grounds they have, because the  
6 presumption is that all documents in this case will be publicly  
7 filed unless there is a reason to not do that that's  
8 articulated and a motion is made to not do that. That is the  
9 presumption. So it is their motion.

10 I am going to also suggest that any filings at this  
11 point should be exchanged between the parties before they are  
12 filed and each party will have 48 hours to look at those  
13 documents and indicate that they have an objection to filing  
14 the portions of that document unredacted. Then the documents  
15 should be sent to the court. If there's no objection, the  
16 documents would be filed. To the extent there's an objection,  
17 the document should be filed either redacted or not filed at  
18 all until a ruling from the court. So you can submit them to  
19 the court but we'll deal with the issue of filing.

20 MR. YALOWITZ: Okay. That's a great procedure, your  
21 Honor. That's essentially the procedure that we used with the  
22 joint pretrial order, and so the joint pretrial order, which  
23 chambers has but which has not been put up on ECF, is ready for  
24 a ruling by the court on this issue. So I think both sides  
25 have discussed it, both sides have made their arguments in

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1 letters to the court, which have also been submitted to  
2 chambers but have not yet been put up on ECF, and so frankly --

3 THE COURT: I have a continuing procedure you should  
4 use, I'll look at it right away and make a ruling right away.  
5 If I think I need to hear more specifically from you as I  
6 review it more closely, then I'll hear from you on April 8<sup>th</sup>  
7 and then we'll decide whether or not things should be put out.  
8 But I think that, you know, I need a compelling legal argument  
9 from the defense, if that's only a defense issue, why documents  
10 in this litigation should not be public documents, and it's got  
11 to be more than just, "It may make my clients look bad."  
12 Obviously it's got to be some other argument, and if there's  
13 another argument to be made, then I will hear it, and if it's  
14 appropriate to do so, I will do so, but as I say, the parties,  
15 even when they agree, they want to file things under seal. I  
16 say that's not your choice. This is a public courthouse that  
17 resolves public issues in public, not behind closed doors. And  
18 so therefore, the litigation presumption is going to be that  
19 unless you articulate the particular reason why certain things  
20 should not be made public, documents are made public in the  
21 course of litigation, and particularly there's a significant  
22 hurdle to overcome if those documents are already somehow in  
23 the public domain. So if the documents are already in the  
24 hands of the public, I don't think it's a compelling reason  
25 that you don't want it to be public here, so it's got to be

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1 some private document that has not been publicly disclosed that  
2 there is a compelling legal reason to not have that evidence  
3 available in an open proceeding. That's basically it.

4 MR. HILL: Your Honor, I'm happy to address that in  
5 our meeting in April on the 4<sup>th</sup>. Some of it is intelligence  
6 material, which is the basis for the concern.

7 THE COURT: Then the only other thing is there are  
8 still some objections that were made that are still outstanding  
9 on Judge Ellis' ruling. Other than the one about the BBC and  
10 my discussions with Magistrate Judge Ellis and my review of the  
11 papers, I don't have a recollection in my mind that I was  
12 particularly compelled to overrule him based on error of law or  
13 facts or an abuse of discretion with regard to those issues,  
14 but I will look at them one more time.

15 As I say, the BBC issue, I didn't feel that BBC should  
16 be forced to give up the outtakes for the reasons that you  
17 articulate. But with regard to further discovery and those  
18 kinds of issues, I'll look at them one more time, but it's  
19 likely that I'm going to go ahead and sustain United States  
20 Magistrate Judge Ellis on all the motions on this issue.

21 MR. YALOWITZ: So if I may be heard on -- I think  
22 there are really two issues there with regard to Judge Ellis'  
23 decisions that we've objected to. The first is one we've  
24 discussed, which is the defendants' own document production,  
25 and just to be very clear, the vast majority of documents that

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were the subject of our objection to Judge Ellis' ruling were documents produced after the discovery cutoff, and our request is to have a discovery device so that we can lay foundation and establish authenticity for admissibility. So whether that's 30(b)(6) or that's a hearing in some other way, I don't -- I'm not picky about the form of it, but it is crucially --

THE COURT: I think the blanket request that you made to United States Magistrate Judge Ellis, I think it's within his purview to deny that blanket request, and I don't think it was inappropriate not to give you carte blanche with regard to those issues. But to the extent that you believe you have a particular argument to make with regard to the admissibility or further action with regard to the things that were produced, you should articulate that specifically to me and I will resolve, item by item, those issues, but that's not the nature of the request that you made to Judge Ellis. I don't know if you even identified a particular document or piece of evidence that you say falls into this category that you've not been otherwise able to resolve. So I would include that in the issue of items that you say that if you cannot come to some understanding with the other side, that I will give you an opportunity to articulate, and obviously you will get at least some greater consideration if you're articulating that this is evidence that you received after the close of discovery which would have been items that you should have received in due

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1 course earlier in discovery in order to be prepared to confront  
2 any issues with regard to its admissibility.

3 MR. YALOWITZ: So with regard to timing, your Honor,  
4 the timing, is this something we would have the court's  
5 permission to put in our *in limine* submission?

6 THE COURT: Yes. If you wish. Remember, we already  
7 talked about a process where you'd be able to find out, get an  
8 answer from them one way or the other, if it's just an issue of  
9 admissibility, whether they're going to object to the  
10 admissibility and whether or not, you know, they're going to  
11 stipulate to the foundation itself or whether or not it would  
12 be necessary for you to present further evidence for witnesses,  
13 and then you can articulate to me what you think you don't want  
14 to do and what you think that you're unable to do, given the  
15 lateness of the production, and, you know, I can rule with  
16 regards to the admissibility of those items. So you can do  
17 that in due course and you can do that as early as you can.  
18 I'll consider that in the realm of -- because you've only  
19 articulated it to be able to overcome their objection to, you  
20 know, foundational stuff, and I understand your concern that  
21 you don't want to be in a position that the way you are unable  
22 to prove your case is because they produced documents after the  
23 close of discovery or evidence that now you're at a  
24 disadvantage to try to admit into evidence and there's no  
25 legitimate reason for them to object to it because they don't

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1 dispute its authenticity or that it is what it purports to be,  
2 which would be otherwise admissible.

3 So you can identify those items you can't come to  
4 terms with and you can articulate, you know, what it is that  
5 you want to do with it, depending on what their position is,  
6 and I'm sure that certain items are going to fall in each of  
7 the categories of things that you need to make proper  
8 foundation or they can't come in or things that you should be  
9 allowed to offer without having to drag in, as you say, another  
10 20 or 30 foundational witnesses who are otherwise clearly  
11 unnecessary because there's no genuine dispute as to the  
12 testimony that the witness would give. You should address that  
13 individually and I'll give those issues --

14 MR. YALOWITZ: Okay. And just picking up on what your  
15 Honor said, I think that when we filed our objection to Judge  
16 Ellis' order, which of course we had to do it within ten days  
17 of receiving it, we had not narrowed down our evidence, and so  
18 now we're dealing with a more confined set, although I will say  
19 that after, there were certain documents that we received, you  
20 know, even right up to the eve of filing the joint pretrial  
21 order, we had to get translated and we're going to have to  
22 designate late, but we now I think have a pretty clear set of  
23 what we're dealing with on that so we'll proceed as your Honor  
24 suggests with that.

25 The second issue that we took up from Judge Ellis that

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I also feel strongly about is an issue involving one of the plaintiffs named -- two of the plaintiffs named Guetta, and the Guetta attack, unlike most of the other attacks, was never solved. The crime was not solved. We had a -- there was a group of Palestinian Authority police officers who were convicted of attacks very similar to the one that happened to our plaintiffs in the same place and during the same general time period.

THE COURT: And your application is what?

MR. YALOWITZ: And so our application was that we didn't know about this particular shooter until after the close of discovery and we wanted to add him to the list of people for whom we were seeking documents from the defendants. So for example, the defendants should have payroll records on him, they should have -- they have his martyr file, which we have a copy of from another case, but whatever, you know -- they have intelligence files on him. Whatever they have on him should be turned over. And the reason we didn't request it during the fact discovery period was because we didn't know he was the shooter and it wasn't --

THE COURT: Well, why not is the question.

MR. YALOWITZ: Because the crime was not solved.

THE COURT: But I mean, why do you know it now and didn't know it then?

MR. YALOWITZ: Sure. So in February of 2013, our

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1 investigator procured a photo array that included this  
2 individual.

3 THE COURT: Is there any reason why your investigator  
4 couldn't have procured that earlier?

5 MR. YALOWITZ: Well, your Honor, I will say I don't  
6 believe that we thought we were going to have to go to the  
7 lengths that we eventually went to because we thought we were  
8 going to get more information in discovery, and it was only  
9 after discovery was cut off that we understood that we didn't  
10 have the information we thought we would have.

11 THE COURT: Well, you never had the information that  
12 you thought you were going to have until you got it.

13 MR. YALOWITZ: What we got was a photo and we then  
14 showed the photo to the plaintiff in an array, and she ID'd the  
15 shooter, one of the shooters. And so we're now in a position  
16 where we would like information relating to this individual to  
17 show that he was involved in similar crimes, to show that he  
18 was on the payroll of the defendants, to link him, if not to  
19 the particular crime, to the pattern of crimes that occurred in  
20 this area at this time, of which he was a member of the, for  
21 lack of a better word, the gang of people that perpetrated the  
22 crimes.

23 THE COURT: But I assume that you asked the general  
24 questions that would have included those participants of the  
25 defendants and they responded, I assume, that --

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1                   MR. YALOWITZ: I believe they refused to provide the  
2 discovery, your Honor. It was before I was in the case.

3                   THE COURT: I'm not talking about that. I assume you  
4 asked them for discovery that would have disclosed this  
5 individual, had they properly responded to it, and your  
6 argument is not that they didn't properly respond to the  
7 discovery but that now that you've shown the witness the photo,  
8 now you want them to give you more information about this  
9 individual when they never disclosed any information about this  
10 individual in response to any of your requests.

11                  MR. YALOWITZ: I think that's right, your Honor.

12                  THE COURT: Well, then what makes you --

13                  MR. YALOWITZ: I think what you said is right. You  
14 know, it wasn't -- I wasn't in the case when this occurred --

15                  THE COURT: Right.

16                  MR. YALOWITZ: -- but from reading the papers, what  
17 appears to me what happened is, the plaintiffs asked very broad  
18 document questions, as plaintiffs generally do. The defendants  
19 objected that it was too broad.

20                  THE COURT: Right.

21                  MR. YALOWITZ: There was a dispute. The dispute was  
22 taken to Judge Ellis and ultimately to your Honor.

23                  THE COURT: Right.

24                  MR. YALOWITZ: And the result was that the defendants  
25 successfully resisted the broad discovery that would have given

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1 us the information about a whole array of people.

2 THE COURT: But I don't know what that is. You didn't  
3 articulate to Magistrate Judge Ellis, nor have you articulated  
4 to me in what way that you stated your direct response request  
5 that would have disclosed the information that would have put  
6 you in a position during discovery to have what you need. I  
7 still don't have any basis to understand what it is that Judge  
8 Ellis -- Judge Ellis just basically said, look, this is a  
9 little late for you to tell me after discovery closes that now  
10 you want something that you say should have been given to you  
11 all along, but you don't tell him or me in response to what  
12 request you should have been given this information, how you  
13 should have been given a different response. So I'll look at  
14 it more specifically, but at this point, unless you direct my  
15 attention to it, I don't have any specifics that gives me a  
16 basis to say that you should have a right to now demand further  
17 discovery when there's no basis to conclude that they responded  
18 inappropriately to your discovery requests and there's no basis  
19 to conclude that you thought you had an inadequate response and  
20 you asked the court to grant you further relief to make them  
21 give you the information that you now say that, you know, you  
22 think that they have that you want because now you've done a  
23 photo array.

24 MR. YALOWITZ: So your Honor, we have submitted the  
25 original document requests -- they were attached to my

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1 affidavit -- and our objection. I'm sure your Honor has had a  
2 chance to look at them, along with the large amount of paper in  
3 this case. And I've just flipped to Exhibit T, which asks for  
4 all documents concerning the terrorist attack, including  
5 without limitation in the paper files of a variety of agencies.

6 THE COURT: Right.

7 MR. YALOWITZ: And so I think that --

8 THE COURT: And their position was that, and still is,  
9 that this photo was not in response to that and that  
10 information about this individual was not their response. Now  
11 your position now is that you've subsequently had an  
12 identification that makes this person someone who's been  
13 identified, but --

14 MR. YALOWITZ: Right. It's newly discovered evidence.  
15 It's newly discovered evidence. So we said give us everything.

16 THE COURT: It may be newly discovered evidence, but  
17 it was not what they say. You say this is the guy now, after  
18 discovery is closed. They never said this is the guy and they  
19 don't say this is the guy now.

20 MR. YALOWITZ: They don't -- that's true. I agree.

21 THE COURT: So it wasn't responsive to your request.  
22 You say, give me all the information about this, and their  
23 position is, this guy has nothing to do with it. So they  
24 didn't produce that. See, it's unclear to me how it is you got  
25 the photo and what that was in response to and --

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1                   MR. YALOWITZ: We got the photo through our own  
2 efforts, and -- we got the photo through our own efforts and --

3                   THE COURT: Well, then, again, my question is the  
4 same. Why couldn't you, through your own efforts, have done  
5 what you did to get the photo before discovery had closed?

6                   MR. YALOWITZ: So, your Honor, as I said, I wasn't in  
7 the case so I don't know. I believe the answer is that we were  
8 perhaps unwisely thinking that we would get a broader amount of  
9 discovery than we got and so --

10                  THE COURT: But not getting it, I can't fault  
11 Magistrate Judge Ellis for saying that --

12                  (Counsel conferring)

13                  THE COURT: I mean, you want me to fault Magistrate  
14 Judge Ellis for saying that he's not going to open up discovery  
15 now because you guys made the mistake by not uncovering this  
16 sooner and have no legitimate argument that you were somehow  
17 prevented from being in this position while discovery was going  
18 on for quite some time, and, I mean, you can't even fault the  
19 other side for not disclosing this photo to you or this photo  
20 array because that wasn't part of their late discovery, it was  
21 part of your late determination, and as I say, I don't know  
22 what the argument is, that you found this out on Wednesday and  
23 Tuesday was the deadline and why you couldn't have found this  
24 out on Monday.

25                  MR. YALOWITZ: Well, your Honor, you know, I hear what

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1 you're saying, and candidly, I'm just trying to position -- to  
2 explain it.

3 THE COURT: I understand.

4 MR. YALOWITZ: I can tell you that, you know, this is  
5 a case in which -- this is a case in which a woman and her  
6 12-year-old son were raped by machine gunfire by four men with  
7 Kalashnikov rifles at a place and time where we now know many  
8 employees of the defendants were doing that to civilians, and  
9 so this is a woman who, we thought we had identified one of the  
10 shooters. She had in her mind's eye -- her testimony is, she  
11 had in her mind's eye --

12 THE COURT: Another person. A different person.

13 MR. YALOWITZ: -- a very clear picture of the shooter,  
14 and we thought it was somebody else, and when we showed her a  
15 picture of the person who we thought it was, she said no,  
16 that's not him. So which, you know, to her credit, and  
17 that's -- so I don't know as I stand here today the chronology  
18 of who did what when, and I'm not -- I don't want to stand here  
19 and criticize Judge Ellis. He's been diligent, he's been, you  
20 know, very solicitous of the parties, but I think on this one  
21 issue, I think that some mercy is warranted, because we have  
22 evidence that we believed to exist that would link this  
23 individual quite closely to the defendants. We have other  
24 evidence. It's not like it's going to kill the case. I'll --

25 THE COURT: That's what I was going to say. Even what

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1 you're demanding now seems to me to be cumulative rather than  
2 the only evidence that you think that you have that he had some  
3 connections with the defendants.

4 MR. YALOWITZ: Well, you know, we're plaintiffs and so  
5 we -- I mean, we want -- we don't want to overwhelm the jury  
6 with duplicative evidence, but I think the payroll records and  
7 the intelligence reports, which we've gotten for all the other  
8 perpetrators, would be appropriate to get here in the  
9 circumstances, and in particular, although we have a very nice  
10 photo of this fellow and we have other photos, it would be good  
11 to be able to get the photo from the defendant. We asked the  
12 Israeli authorities for the photo, through like a FOIA type  
13 request --

14 THE COURT: Right.

15 MR. YALOWITZ: -- and they said, we can't give you the  
16 photo without the permission -- it's a joint database, and  
17 we're not going to officially provide the photo without the  
18 defendant -- without the PA agreeing. They have a lot of  
19 joint, you know, work that they do.

20 THE COURT: I understand.

21 MR. YALOWITZ: And so I will say, I'm not going to  
22 stand here and say it will kill this woman's case, because I  
23 don't think it will kill the case, but I think in fairness, the  
24 jury ought to have a complete picture, and I think given the  
25 circumstances and given the lack of prejudice to the defendants

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1 and given especially how long, you know -- we've been getting  
2 documents trickling out from the defendants in March, over the  
3 summer, in December, even as late as January. We're still, you  
4 know, almost a year away from trial, and I don't think that in  
5 fairness they would be prejudiced by producing this  
6 information. And without faulting Judge Ellis, I think this is  
7 a case where justice would warrant asking -- commanding the  
8 defendants to produce this very limited category of  
9 information.

10 THE COURT: All right. Well, I'll look at it one  
11 final time, but obviously I think that there are two other  
12 compelling issues. One is that there's got to be some finality  
13 to discovery and it should be and has been done in a way that's  
14 fair to both sides and, you know, and we have to abide by a set  
15 of rules. Otherwise, right up until the trial is over, I'll be  
16 hearing mercy arguments. That's not what compels the rules  
17 that have to apply to both sides, because I'm sure that there  
18 will be a time when you're going to say that they haven't  
19 abided by the rules and sympathy shouldn't persuade me to allow  
20 them to skirt those rules even though they were fully aware  
21 that those rules had to be abided by, and as you say, it may  
22 not be undue prejudice but it is clearly prejudice, because  
23 it's clearly not to their benefit and clearly to your benefit.  
24 It may be appropriate to do so under the circumstances, but as  
25 I say, the parties, you know, had a full opportunity to do

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1 discovery, everyone knew what the bounds of that discovery and  
2 the time frames of that discovery was going to be, and as you  
3 say, this is an issue that is not otherwise fatal to your  
4 client's case. It is an additional piece of evidence that you  
5 would like to have if it exists that you did not determine in a  
6 timely manner.

7 So, you know, it might have been a more compelling  
8 argument to make up front to me or to Judge Ellis, not a review  
9 of whether or not Judge Ellis made the wrong determination.  
10 Again, I don't review it on the basis of if I were in Judge  
11 Ellis' situation, would I have made the same decision. I view  
12 it on the basis of whether or not Judge Ellis appropriately  
13 made a decision consistent with the law and the facts and  
14 didn't misapply them and that it was within Judge Ellis'  
15 discretion, consistent with the way he conducted discovery, to  
16 deny a request after the close of discovery to reopen discovery  
17 on this issue because the plaintiffs now believe that  
18 determining it subsequent to discovery might be to their  
19 advantage to do so. So I'll look at it again but that did not  
20 compel that any issues had been raised that suggest that Judge  
21 Ellis inappropriately handled it with regard to the conduct of  
22 discovery.

23 MR. YALOWITZ: We certainly appreciate your Honor  
24 taking one last look at the papers.

25 I'll just leave the court with -- and I hear your

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1 tentative views and I respect them. Just two thoughts I think  
2 are important. One, I don't believe the plaintiffs skirted  
3 discovery rules here. I think --

4 THE COURT: No, I don't think they did at all, but I  
5 think it is outside of the rules that are set that now that you  
6 have discovery, after discovery is closed, and I'm sure  
7 Magistrate Judge Ellis anticipated and the parties anticipated  
8 that you might determine that you wish you had asked for  
9 something in a timely manner when discovery was open and you  
10 still would like it, it would be helpful to you if you could  
11 get that, but, you know, the rules don't allow for that.

12 MR. YALOWITZ: Sure. The other thing I would ask your  
13 Honor is, in reviewing the papers, if you would pay close  
14 attention to Exhibit T, which is that very broad request,  
15 because I think the court might conclude on review and  
16 reflection that the files we're seeking are fairly encompassed  
17 within Exhibit T. But you'll take a look at that I'm sure and  
18 reach a just conclusion.

19 THE COURT: All right.

20 MR. YALOWITZ: And just -- I don't want to belabor it,  
21 but I will say that the defendants requested and received  
22 curative discovery from plaintiffs. They asked for a further  
23 deposition of Mrs. Guetta, they gave very -- they spent a long  
24 time with her, she gave very fulsome testimony, and to the  
25 extent that they might have been prejudiced by the late

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2 disclosure, I don't think there's any argument that there is  
3 because that was cured, and we're just asking for some  
reciprocity in that regard.

4 THE COURT: Okay. I will do that.

5 MR. YALOWITZ: Thank you so much, sir.

6 THE COURT: Anything final from defense?

7 MR. ROCHON: Only by way of scheduling, your Honor.

8 We had previously discussed April 4<sup>th</sup> and April 8<sup>th</sup>. I  
9 think the issues are important enough that I would like to be  
10 present for the hearing, and I'm wondering if April 11<sup>th</sup> is a  
11 day that would be available to the court. Mr. Hill would be  
12 able to come back early from whatever holiday he has and the  
13 three of us could be missing part of our firm retreat, so it  
14 would have this added bonus. Is April 11<sup>th</sup> a day that you  
15 could have the hearing on the motion?

16 THE COURT: The problem is, I start trial that week.  
17 I'm supposed to be on trial.

18 MR. ROCHON: We had discussed April 8<sup>th</sup>. If  
19 April 11<sup>th</sup> is not good for the court, we can fall back to  
20 April 8<sup>th</sup>, and Mr. Hill will not be able to be here. But I  
21 do think that given the issues, that Mr. Hill would like to be  
22 present.

23 THE COURT: I'll do April 11<sup>th</sup>.

24 MR. ROCHON: Thank you, your Honor.

25 THE COURT: The only thing is that, depending on

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1 whether that trial in fact goes and what the status of the  
2 trial is, it's possible that I may push you till the afternoon  
3 rather than the morning.

4 MR. ROCHON: Do you want to just set it for the  
5 afternoon, your Honor?

6 THE COURT: Why don't we set it for 2:00 at this point  
7 and I'll send the jury home early for their weekend. So 2:00.

8 MR. ROCHON: Thank you for your consideration on that,  
9 your Honor.

10 THE COURT: All right. Then I'll see all the parties  
11 at that time and I'll review the papers and I'll resolve this  
12 other issue.

13 MR. YALOWITZ: Thank you for giving us so much time  
14 today, your Honor.

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